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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,

Petitioner,

vs.

SOUTHERN PACIFIC CO., A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALLEN SPIVOCK,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit	1
Statement of matter involved	1
Jurisdiction of this Court	15
Questions presented	16
Reasons relied on for the allowance of the writ	19
Exhibits A, B, C and D	29
Brief in support of petition for writ of certiorari	35
I. Opinion of the Court below	35
II. Jurisdiction of this Court	35
III. Statement of the case	35
IV. Specification of errors	36
Argument	39
I. Irregularities in selection of jury preventing fair trial to plaintiff	39
A. Plaintiff's motion to strike out entire panel	39
B. Plaintiff's motion to strike out his demand for jury trial	46
C. Plaintiff's motion to strike out the 12 jurors in the box	47
II. The evidence is wholly insufficient to sustain the verdict and judgment	48
A. Plaintiff's motion for instructed verdict should have been granted	48
1. Admitted failure to care for accepted passenger known to be demented	51
2. Admitted failure to stop train when plaintiff discovered in peril	54
3. Admitted failure to give any first aid	55
III to VI. Other points raised on the appeal	58
Conclusion	58

Table of Authorities Cited

Cases:

	Page
Alabama Great S. R. Co. v. *Taylor*, 199 So. 310, 312 (Miss. 1940)	56
Benson v. *Tacoma Ry.*, 98 Pac. 605, 51 Wash. 216	51, 53
Bourgeois v. *Toye Bros. Yellow Cab.*, 192 So. 379 (La. 1940)	52, 53
Brashears v. *Union Dredging*, 9 Cir., 104 F. (2d) 762 (1939)	53
Calloway v. *Hart*, 5 Cir., 146 F. (2d) 103, 89 L. Ed. 895 (1944)	25, 51, 52
Casteel v. *American Air Ways*, 88 S. W. (2d) 976, 979 (Ky.)	52, 56
Clinton v. *Englebrecht*, 13 Wall. 343 (1872)	46
Dokus v. *Palmer*, 33 A. (2d) 315, 317 (Conn. 1943)	52, 53
Dyche v. *Vicksburg S. & P. R. Co.*, 30 So. 711, 79 Miss. 361	56
Eastern v. *Dickenson*, 107 F. (2d) 116, 120	57
Fitzgerald v. *Southern Pacific Co.*, 36 Cal. Ap. 660, 663	49
Fox v. *Michigan Central R. Co.*, 101 N. W. 624, 626, 138 Mich. 433	52
Glasser v. *United States*, 315 U. S. 60, 85	20, 28, 45
Hellman v. *L. A. Ry.*, 27 Pac. (2d) 946, 951, 135 Cal. Ap. 627, 642	54
Jameitis v. *Wilkes-Barre Ry. Co.*, 121 A. 317, 277 Pa. 437	52, 53
Kline v. *Santa Barbara, etc., Ry. Co.*, 150 Cal. 741, 745	48
Le Tulle v. *Scofield*, 308 U. S. 415, 416, 419	27
Louisville, etc., Ry. Co. v. *Gregory's Admr.*, 133 S. W. 805, 811	54
Mamaux v. *U. S.*, 6 Cir., 264 Fed. 816 (1920)	45
Montgomery Ward v. *Duncan*, 85 L. Ed. 147, 167	57
Murphy v. *Southern Pacific Co.*, 101 Pac. 322, 31 Nev. 120	49
Nat. Labor, etc., v. *Union Pacific*, 9 Cir., 99 F. (2d) 153, 175	49
Norris v. *Alabama*, 294 U. S. 587, 589 (1935)	8, 24, 41, 45

	Page
Olson v. *Minneapolis, etc., Ry. Co.*, 175 N. W. 371, 372	52, 53
Paris, etc. Ry. Co. v. *Robinson*, 140 S. W. 434, 437	53, 54
Pennsylvania Co. v. *Roy*, 102 U. S. 451, 456	
Pessagno v. *Euclid*, 112 F. (2d) 577, 579-80	37
Pittman v. *Hines*, 221 S. W. 474	52
Pointer v. *United States*, 151 U. S. 396, 407	44
Pratt v. *Pratt*, 74 Pac. 742, 744, 141 Cal. 247, 252	48
Reliance Life Ins. v. *Burgess*, 7 Cir., 112 F. (2d) 234, 240, 311 U. S. 690	37
Sherman v. *Southern Pacific Co.*, 144 Pac. 416, 426, 33 Nev. 385	49
St. Clair v. *U. S.*, 154 U. S. 134, 148	24, 44
State of Minn. v. *County Board*, 213 N. W. 545, 52 A. L. R. 916, 918	45
State v. *Bolin*, 10 Wyo. 439, 471	46
Stewart v. *Houston Ry. Co.*, 229 S. W. 577	52
Thiel v. *Southern Pacific Co.*, 126 F. (2d) 110, 316 U. S. 698	15
U. S. v. *Ballard*, 35 F. Supp. 105	46
U. S. v. *Chaplin*, 54 F. Supp. 682 (1944)	26, 46
U. S. v. *Rizzo*, 297 U. S. 530, 533	27
U. S. v. *Roemig*, 52 F. Supp. 857 (1943)	26, 46
Walker v. *U. S.*, 93 F. (2d) 383	45
Westwater v. *Southern Pacific Co.*, 38 Cal. Ap. (2d) 369, 101 Pac. (2d) 154	52
Wheeler v. *Grand Trunk Ry. Co.*, 50 A. 103	53

CODES, STATUTES AND RULES

Calfornia, Civil Code, Section 2100	48
California Code of Civil Procedure, Sec. 198	44
California Code of Civil Procedure, Sec. 204b	40
California Code of Civil Procedure, Sec. 204c, 205, 206	40, 45
28 U. S. C. A. Sec. 411	44
28 U. S. C. A. Sec. 413	45
7th Amendment to Federal Constitution	46
14th Amendment to Federal Constitution	46
Federal Rule of Civil Procedure 50(b)	

TEXTS

	Page
10 American Juris., page 284	53
13 Corpus Juris. Secundum, page 1552, Sec. 782	53, 55
35 Corpus Juris. Secundum, Section 204b(2), page Note 110, Note 10	27
35 Corpus Juris. Secundum, page 1133, Section 135	46
Hutchinson on Carriers, 3rd Edition, Sec. 1230	53

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of said Gilbert E. Thiel for a review on writ of certiorari of the decision of the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

Statement of Matter Involved

Stated as briefly as possible, on December 30, 1940, plaintiff and appellant Gilbert E. Thiel, petitioner herein, aged

28, filed a complaint in the State Superior Court of California for $250,000.00 damages for loss of both legs and the use of one arm sustained while a passenger on a train of the defendant Southern Pacific Co., a corporation, respondent herein. Said complaint also named several "Doe" defendants (R. 3-5). Said defendant Company promptly removed the case to the Federal District Court at San Francisco, California, because it was a Kentucky corporation. Plaintiff opposed the removal but was unable to prevent same as he did not have the names or addresses of said "Does." However, when the answers to plaintiff's interrogatories in said Federal Court revealed this information and there was then no diversity of citizenship because of the California residence of one of them, plaintiff promptly moved to amend his complaint and to remand the case to the State Court.

Obtaining remand to the State Court became *extremely vital* to plaintiff when his attorney received positive and definite information from many attorneys whose cases had recently been similarly transferred to said Federal Court that it was *impossible* to win a jury case against said defendant Southern Pacific Co. in said Federal Court, because they had found the jurors were all "hand picked" instead of being selected by lot and "peculiarly" they were nearly all connected with said defendant Company by business, social or other ties and thus subject to influence by said defendant Company (R. 13-14).

Plaintiff's two motions to obtain remand which seemed to be clearly in order were vigorously opposed by said defendant Company and were denied and plaintiff was restrained from proceeding further in the State Court. Plaintiff appealed to the Circuit Court of Appeals but was denied any relief or even any consideration of the points specifically raised by him, and finally, in desperation, plain-

tiff even applied for certiorari to this Supreme Court on the technical question of the legal procedure to remand but was denied a hearing. *126 F. (2) 110; 346 U. S. 698* (1942). Thus, plaintiff was left with no choice but to proceed with his suit in the Federal Court.

Briefly, the complaint made *three* main charges of negligence. *Firstly,* it alleged that on February 25, 1940, at Reno, Nevada, plaintiff was accepted as a passenger for an all night ride to San Francisco by defendant Southern Pacific Co. whose agents were specifically "*informed,*" before the train started, "that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash;" that defendant's "special police officer remained with plaintiff for some time but then" carelessly "left him alone and unguarded" (R. 4).

Secondly, it was alleged that while the train was in motion and while plaintiff was in said abnormal condition, he suddenly opened a train window and started to get out and then hung onto the window sill "for some time until he fell to the ground" but defendant's "conductor" who observed all this "carelessly failed to give the stop signal until *after* plaintiff had fallen to the ground" (R. 4).

Thirdly, it was alleged "That upon falling from said train, both of plaintiff's feet were cut off at the ankles" but he was given no first-aid whatever (R. 6-9). Defendant Company later *admitted* that his ankles were left bleeding for one hour until he was brought to Truckee.

It was further alleged that there he received careless attention so that gas bacillus infection developed requiring amputation of both of plaintiff's legs (R. 69).

Defendant's answer denied negligence on any of said three main charges but admitted it was "informed" of plaintiff's condition before the train started and admitted "it was a *fact* that he had been so drinking" (R. 5-6). Defendant also admitted that "plaintiff was in an abnormal psychological and mental state" (R. 7).

Immediately after this case was transferred by defendant Company to the Federal Court, plaintiff filed his demand for a jury trial. When the Appellate Courts denied plaintiff any relief so that he might proceed in the State Court, the case was set for trial in the Federal Court on November 24, 1942.

Plaintiff had been employed mainly as a mechanic. On November 5, 1942, plaintiff filed a motion to strike out the entire jury panel (R. 9) and also filed an affidavit by his counsel (R. 11), showing that the Clerk and Jury Commissioner who select the trial jurors plainly stated to affiant that they were guided by no rules from the Court but *deliberately* and *purposely* selected mostly men instead of women and these men were mostly business executives or employed by large corporations; that the result is that said jurors obviously have the employer's viewpoint and are not sympathetic to a mere wage earner such as plaintiff here. Said affidavit further pointed out that the "*effect*" of said "system" was that said defendant Southern Pacific Co. has prevailed in every personal injury and death action for the past nine years; that said defendant has made it a regular practice to use every effort to remove all such cases from the State to the Federal Court; that five of the attorneys for the plaintiffs in cases tried most recently informed affiant that the jurors were

nearly all business executives and business men and it was apparent that they were connected with or in some way subject to influence by said defendant Company so that the plaintiffs did not receive a fair verdict, whereas they would have prevailed in the State Court (R. 13-14).

On November 9, 1942, at the hearing of said motion (R. 15), the Clerk testified that he has been such for 30 years last past; that as part of his duties, he selects one-half of the names for trial jurors for the Federal District Court, the other half being selected by the Jury Commissioner who has served for the past three years; that his method "generally speaking, is to take the City Directory and select the names of people who I think, *from their occupation and residence*, would be *intelligent* people to act as jurors in this Court" (R. 28); that he does not select anyone listed as a "longshoreman" or anyone working for a daily wage because he believes they would not want to serve (R. 29-31); that the number of men selected "who might be mechanics, janitors or of the labor class" "would be a small percentage" (R. 32); that the "*majority* would be business people and "their wives" (R. 36) and "*their* employees" (R. 37); that *at* LEAST 50% " "had responsible positions and had pretty *substantial salaries*" (R. 37); that no selection rules are prescribed by the Judges (R. 32); that no effort is made to equalize men and women as jurors (R. 32) or to apportion the jurors by districts (R. 34); that the above procedure "applies to the jury list" in this case (R. 35).

The Jury Commissioner testified that "*at* LEAST 50%" of those he selects are "CONNECTED WITH some BIG BUSINESS concern" (R. 46); that he omits *all* "carpenters"; that he "EXCLUDES, PURPOSELY" "ALL the iron craft, bricklayers, carpenters, and machinists" (R. 47); that he has "EXCLUDED" "ALL of those groups from the jury list" (R. 47); that he has no recollection of ever selecting a "laborer" (R.

48); that "his duty was merely to select a CROSS SECTION of the people in San Francisco who might be impartial and fair jurors" (R. 48), but he made *no* effort to get a "CROSS SECTION of the people of San Francisco with regard to wealth" (R. 51); that he has "PURPOSELY put on *more* men than women" (R. 48); that he makes no effort to apportion by districts (R. 49); that he has no rules to guide him and does not follow or even know the applicable California Code sections (R. 49); that the above method of selection was used for this case (R. 51); that "*at* LEAST 50%" of the names selected are from the "BUSINESS DISTRICT of San Francisco" (R. 51).

Two attorneys with considerable jury trial experience bluntly testified that they had won verdicts against defendant Southern Pacific Co. in the State Courts but found it impossible to win in the Federal Court because the jurors are all connected with big business concerns and are all biased in favor of the Southern Pacific Co. (R. 16-22; 23-26) They further testified that in the City and County of San Francisco "about three-quarters of the population were either working people or members of their family" (R. 22) and in Alameda County "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

Judge John C. Bowen denied the motion (R. 68) with the frank remark that since a somewhat similar motion had been denied here some months before in a *criminal* case (R. 40), it was not for him who was merely an outside judge from Seattle, Washington, to come to San Francisco and change the jury system which was being followed for so many years.

On November 21, 1942, at the pre-trial conference, being sincerely convinced that the jury would be controlled by "friends" of the defendant S. P. Co., plaintiff felt compelled to waive a jury trial and place his faith in the new Judge

from Seattle but the defendant Company refused to agree and stoutly insisted upon a jury trial which the Court ordered (R. 70).

The trial started on November 24, 1942. There were 24 prospective jurors who were actually examined. Of these, the Court excused a total of 7 because 6 of them were business executives having very large and continuous business dealings and connections with the defendant Southern Pacific Co. (R. 113-122), and it excused 1 vice-president of a bank with a Southern Pacific Co. account but mainly because he was a fraternity brother of defendant's counsel (R. 115). Plaintiff exercised his full limit of 3 peremptory challenges against those doing business with officials or employees of the S. P. Co. (R. 109, 98, 111, 99, 117, 111), but defendant was content to use only 2, one against an alleged friend of plaintiff's counsel (R. 110), and the other against a woman who said that neither she nor her husband knew anyone in the S. P. Co. (R. 110-113). This left twelve jurors in the box.

Upon inquiry by the Court, plaintiff said the jury would be accepted "subject to a motion which I will make outside of the presence of the jury" (R. 124). The Court recessed for lunch. Then plaintiff moved to strike out all twelve jurors in the box and entered a "challenge" "for *cause*" against all of them stating that "by actual experience" it then appeared that there were on the jury "at *least* six jurors who are closely affiliated and connected with the Southern Pacific Company" as follows (R. 124-125):

> "Mr. Gale, Juror No. 12, owns stock in the Pacific Greyhound Company, which he knows to be a subsidiary of the Southern Pacific Company.
>
> "Mrs. Goeppner's husband is a florist who does considerable business with the Southern Pacific Company, and Mr. Dunne, opposing counsel, has a charge ac-

count at her husband's place of business. I might state Mrs. Goeppner is Juror No. 4.

"Mr. Hohweisner, Juror No. 8, an insurance broker, plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Co.

"Mr. Levensaler knows the head ticket agent and a very high official of the defendant Southern Pacific Company. Mr. Levensaler is Juror No. 3.

"Mr. Knight is an important executive, sales manager, * * * of Schwabacher-Frey Company, a very large corporation in San Francisco, here which does a considerable business with the Southern Pacific Company. * * *

"And then Mr. Bright, Juror No. 10, although he is a retired postal clerk, he has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith of the Traffic Department of the Southern Pacific Company" (R. 125).

Plaintiff stated that since a "very powerful showing" had been made that "the selection has been almost entirely of the business and executive type that is bound to have business with the Southern Pacific Company," it is "axiomatic that the final result is bound to be wrong (R. 126), and he then cited *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935), arguing that where a jury selection may even appear fair, the Court should inquire whether there is discrimination "in substance and effect" against plaintiff who is a workingman (R. 126).

Owing to the lack of time for preparation during the shortened lunch period and the further fact that plaintiff's counsel was entirely unassisted by other counsel, due to war conditions, he failed to mention that said Juror Gale, an insurance broker, also admitted that he has "handled insurance of probably three of the company" (R. 108). (The record fails to show that he mentioned Angus McDonald, former president of the S. P. Co., as one of his clients.) Plaintiff also failed to mention that

Juror Kugelburgh was a department manager of an import and export concern doing $5,000 yearly business with the defendant (R. 118). The Court itself agreed to and did excuse those whose firms did over $50,000 yearly business with the Southern Pacific Co. (R. 113, 117, 119-20, 121). Plaintiff also failed to mention that Juror Hales, a rice broker, said he had dealings with the S. P. Co. and knew the "head of the Freight and Passenger Department" (R. 121); and that Juror Martens, retired commission broker, formerly did business with the Southern Pacific Co. (R. 106); and that Juror Morgan, retired railway postal clerk, had served on the S. P. Co.'s trains (R. 92). Thus, there was a total of 10 jurors in the box, or 83% who *admittedly* had some business or social or friendly ties with the defendant Co.

Also, for lack of time to prepare, plaintiff failed to mention that at least 19 or 79% of the 24 jurors actually examined were either presidents, vice-presidents or some kind of managers of large firms or independent business men or the wife of same, and all of these were in some way connected with the S. P. Co. (R. 86-123), except the wife of a civil engineer excused by defendant (R. 110, 111).

Plaintiff also failed to mention that *at least 21 or 87.5% of the 24* jurors actually examined were *admittedly* connected in some way with the *S. P. Co.* (R. 86-123).

Plaintiff also failed to mention that 5 or 20% of the 24 jurors actually examined were insurance brokers or insurance executives (R. 99-101, 107, 111, 115). This is out of all proportion. Incidentally, the Jury Commissioner is also an insurance broker (R. 46).

Plaintiff also failed to mention that only *one* out of the 24 or 4% was then a working man of the labor class, and by some "strange co-incidence" this one juror, Mr. Morgan, had formerly worked on the S. P. Co.'s trains as a *railway* postal clerk. By an even "stranger coincidence" he was

then employed by the Richmond Shipyard No. 1 which was obviously engaged in 100% *war work* and he would obviously lose his higher *daily wages* while he served as a juror for only $4.00 per day, but yet, the Clerk or Jury Commissioner *selected* him on the panel and he did *not* ask to be excused as a juror because of loss of pay (R. 88-89). The defendant Company "oddly" did *not* exercise its unused third peremptory challenge here.

Plaintiff also failed to mention that only 4 or 16% of the 24 jurors actually examined were women and *none* of these was the wife of a working man of the labor class (R. 91, 94, 95, 110, 111, 120).

After the Court had excused 7 jurors and plaintiff had exhausted his 3 peremptory challenges, the occupations of the 12 jurors consisting of 10 men and but 2 women, before whom plaintiff, a humble wage earner, was *compelled* over his vigorous objections to submit his case are as follows: *3* insurance brokers with addresses in the downtown financial district and who had social and/or business relations with the Southern Pacific Co. *officials* (R. 101-103; 107-109; 115-116), *1* rice broker, doing business with and acquainted with an *official* of the Southern Pacific Co. (R. 120-121), *1* wife of a partner of a large florist firm doing business with the S. P. Co. and with which defendant's counsel now does business (R. 94-95), *1* department manager of an export and import firm doing business with the S. P. Co. (R. 118), *1* retired commission broker who formerly did business with the S. P. Co. (R. 106), *1* sales manager or salesman of a large stationery firm doing business with defendant and who knew some S. P. Co. officials a long time ago (R. 88, 98, 99), *1* retired *railway* postal clerk who named two employees of the S. P. Co. with whom he was well acquainted (R. 105-106), *1* retired *railway* postal clerk who served on the S. P. Co.'s trains (R. 91-92) but was then employed in a

ship yard (R. 88), *1* retired "steel erector" (R. 122) (who definitely appeared to have been so employed in some executive capacity). (In a telephone conversation with said Juror Lutz on January 22, 1944, he stated that he had been a "*contractor* in the steel erection *business*" and was not employed in any actual labor work), and *1* widow of a clerk (who had worked for the Associated Oil Co.) (R. 131, 80).

Thus, there were 7 jurors who clearly represented the employer viewpoint and of the remaining 5, there were 3 who had business or friendly connections with the S. P. Co. This left plaintiff just 2 jurors who might at least appear to be fair. They were the "steel erector" and the "widow."

Plaintiff's motion to strike out the 12 jurors on his challenge for cause was denied and the trial proceeded.

Plaintiff testified that on said February 25, 1940, he was in a highly nervous condition and was suffering from delirium tremens and hallucinations that his life was in danger from attack and he kept asking for police protection from everyone including defendant S. P. Co.'s ticket seller. After a ticket was sold to plaintiff, defendant's railroad policeman was informed of plaintiff's crazy condition and he agreed to ride with plaintiff to protect him, but later got off the train and plaintiff got him to get back on again. When the train started, plaintiff discovered said policeman had gotten off again and plaintiff became panicky and fearful for his safety. Then plaintiff became greatly frightened when in the dim light he believed he saw a man leering at him and believed he saw a knife stuck into a passenger lying on a seat and believing he was about to be attacked, he suddenly opened the train window and proceeded to get out, believing the train was not moving.

When he became aware of the motion, he hung on until he fell to the ground and was injured.

Plaintiff was unable to produce any witnesses to his opening of said window but offered in evidence, among other matters, the rules of defendant S. P. Co. given to all its agents, "cautioning" them to exercise "*great* care" in the handling of demented and intoxicated passengers.

When plaintiff rested, defendant moved to dismiss but the Court stated that plaintiff had presented sufficient evidence "before the Court and jury" and promptly denied the motion.

Then defendant's agents testified. The only slight conflict presented was that said railroad policeman denied that he agreed to ride with plaintiff or that he actually got on the train, as testified to by an impartial witness furnished by defendant, but that he merely escorted plaintiff over to the train as requested. However, the following *vital* ADMISSIONS were made by defendant's agents on the three main issues:

(1) Defendant Company ADMITTED that shortly *before* the train started, defendant had *specific* and *direct notice*, given to its railroad policeman, that plaintiff had been "drinking awfully heavily lately" and was "acting CRAZY from drink" and the "help" of said railroad policeman was *needed* to even get plaintiff on the train as John Morris, a man with plaintiff, "was afraid" that plaintiff "might try to *run away*, having done so once before."

Defendant ADMITTED that sometime *before* the train started, its own ticket seller *observed* that plaintiff did "look drunk" and "He seemed *very* nervous and restless," and its own brakeman actually "*smelled*" liquor from

plaintiff, and its own railroad policeman "*smelled*" liquor from the said man with plaintiff and said ticket seller "got the impression that he (plaintiff) was *afraid* to leave the station."

Defendant ADMITTED that sometime *before* the train started, its own ticket seller received *information directly* from the plaintiff himself about his crazy condition when plaintiff told him that "some one *was after him*," and another ticket seller was told by plaintiff's wife that plaintiff "was somewhat nervous" and "was bothered by too many people" but he sold them three *coach* tickets.

Defendant ADMITTED that its own rules directed to its "Railroad policemen, conductors and ticket sellers" specifically required them to exercise "great care" in handling demented and intoxicated passengers and cautions them not to take such persons unless with an "attendant COMPETENT to afford them the *care and assistance* which their *condition required*" and then only "provided they purchase *drawing room or compartment* accommodations."

Defendant ADMITTED that shortly *before* the train started, its own railroad policeman told its own head brakeman that plaintiff was "acting CRAZY from drinking" and that said brakeman should "*keep an eye* on him" and said brakeman asked said "policeman what was *wrong* with him (the plaintiff)" after they both saw plaintiff get off the train *unattended* and "you could *smell*" the liquor from plaintiff.

Defendant ADMITTED thru its own conductor that it was the "duty" of said brakeman "to look after the passengers"; that it was the "usual procedure" for said policeman to notify "the brakeman or the conductor and tell them there is a man with a lot of drinks"; that if either said brakeman or policeman had performed his

"*duty*" and had given said conductor the "*information*" they had about the crazy plaintiff and his liquor smelling companion, said conductor would have "not permitted (plaintiff) to get on the train. We have a *right* to keep him from getting on the train," and if said conductor took plaintiff, he "would have asked for the officer" to go along or "would have stayed until I got him"; that it is "*part of the duty of the railroad* policeman to ride along with a crazy or intoxicated passenger and it is the "usual procedure" as said conductor has "taken on lots of police officers."

Defendant ADMITTED that with all of the above *specific* and *positive* information about plaintiff's crazy condition, it sold him a ticket and thus ACCEPTED him as a passenger and then neglected to give plaintiff even the slightest care, assistance or protection whatsoever which defendant knew his condition definitely required.

(2) Defendant also ADMITTED that its conductor and brakeman observed that plaintiff "was hanging out the window" for "all of" "a minute and a half," and that, upon signal, the train *could* and *did* stop in "less than a minute" and it backed up 600 feet which is the USUAL stopping distance at said place; that the stop signal was given "Immediately AFTER plaintiff had fallen to the ground below."

(3) Defendant also ADMITTED that the train cut off both of plaintiff's feet so that he was bleeding from his ankles; that defendant was "supposed to have" first aid equipment but had none on hand; that plaintiff was put in the baggage car and "from his open wounds, his ankles, there was a pint or *more* of blood that dripped out" with *nothing being done to stop the obvious bleeding* for ONE HOUR after the accident; that plaintiff was covered with just ONE *sheet* altho there was snow on the ground so that when he was

brought to Truckee "He was *shaking* from the pain or cold. It was a *cold* night; it was VERY COLD. I (a friend of defendant's agents) took my sweater off and put it around his shoulders."

Plaintiff moved for a directed verdict on *each* of the *three* main issues of negligence but it was denied (R. 923-4).

The jury arrived at a verdict for defendant in just fifteen minutes.

Plaintiff moved to set aside the verdict and enter judgment for plaintiff or grant a new trial (R. 76). This was denied.

An appeal was taken to the United States Circuit Court of Appeals on all issues. Plaintiff *emphasized* in his briefs and oral argument that he was not relying on any conflicting evidence but *solely* upon the above ADMISSIONS of the defendant, which alone *clearly* entitled him to judgment AS A MATTER OF LAW. The Circuit Court ignored plaintiff's said position and spoke of *non-existing* "conflicting" and "contrary" evidence (R. 137-138) and continued to overlook same in denying a rehearing (R. 139) altho it was again specifically called to the Court's attention that defendant's admissions ALONE entitled plaintiff to judgment.

Jurisdiction of This Court

1. Jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 347(a) to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Said decision which petitioner seeks to have this Court review was entered on May 15, 1945 (R. 139). A petition for rehearing was denied on June 8, 1945 (R. 139).

3. The jurisdiction of the District Court in this case has already been settled by *Thiel* v. *Southern Pacific Co.*, 126 F. (2) 110; certiorari denied in 316 U. S. 698 (1942).

Questions Presented

Plaintiff believes that all of the questions presented on his appeal are important and they appear fully in the Specification of Errors in the Brief in Support of the Petition herein. However, there are *two main* questions presented here which concern the violation of plaintiff's constitutional rights and plaintiff believes they involved questions of *national* importance:

1. Where the two Court officials who personally and freely select *all* the trial jurors on the panel ADMIT that in selecting jurors for *this case* they *purposely* selected mostly business men and those of the wealthier class who are in the majority, consisting of at *least* 50%, and they *purposely favored* them because they allegedly are more intelligent and that they *purposely excluded* ALL men from the building trades such as the iron craft, bricklayers, carpenters and machinists and workingmen such as longshoremen receiving a daily wage, and where it is ADMITTED that the selection of jurors is not apportioned by districts, but the majority of at *least* 50% is purposely selected from the business district of San Francisco and is connected with *big business* concerns, and where it is ADMITTED that no effort whatever is made to obtain a *cross-section* of the community as jurors, and where it is ADMITTED that more men than women are *purposely* selected, and where the EFFECT of such selection in this case is that only 4 out of 24 jurors actually examined are women and none of them is the wife of a workingman, and where the EFFECT of such selection is that 21 out of 24 jurors actually examined are connected with or tied up by business or social or friendly ties with a *very large and powerful* railroad corporation such as the defendant here, and where the EFFECT of such selection is that only 1 out of 24 or 4% have the occupation of a work

ingman which class represents at least 75% of the population and where plaintiff who is a humble workingman has exhausted all his three peremptory challenges and *vigorously objects* to proceeding to trial before the 12 jurors consisting of 10 men and but 2 women then in the box because some 10 of them have *admitted* social or business connections with said defendant, can it be held that plaintiff has received a fair trial by such a jury? Should not the whole panel have been stricken out as plaintiff requested? Should not the 12 jurors in the box be subject to the challenge for cause made by plaintiff?

II. (a) Where the evidence by ADMISSIONS of defendant's own agents *alone* CONCLUSIVELY shows that a railroad *accepts* as a passenger a person whom its ticket sellers previously know is afraid to leave its station, fearing that someone is about to attack him, and is bothered by too many people and looks drunk and is acting very nervously and rather peculiarly, and then its railroad policeman is asked for assistance to get him on the train and is specifically informed that said passenger has been drinking heavily lately and is acting crazy from drinking and might try to run away as he had done before, but, altho having ample time, said railroad policeman makes no personal or other investigation of said passenger or the man with him from whom he smells liquor before they get on the train for an all night ride in coach seats, and then its head brakeman observes that said passenger looks drunk and very nervous and smells the liquor from him and upon inquiring what is wrong with said passenger, he is told by said policeman to keep an eye on him because he is acting crazy from drink, and then, having ample time, but in violation of his specific duty to take care of passengers and notify the conductor, said brakeman fails to notify the conductor that said passenger is getting aboard in an abnormal, intoxicated and crazy

condition, and then later, said conductor smells liquor from and is informed by said man with said passenger that he must keep an eye on him but nothing whatsoever is done by any of said railroad's agents to protect said passenger either before or after the train is in motion altho said railroad's rules to all its agents specifically caution them to use great care in handling such passengers, and then said passenger while suffering from delirium tremens and under a delusion that he is about to be killed, suddenly opens a window of the moving train and gets outside and tho held on to by others for at least a minute and a half, finally falls to the ground and receives severe injuries, does said conduct of said railroad's agents in failing to care for, assist or guard said demented passenger constitute "slight negligence" on its part? If so, does the *antecedent* negligence on the part of said passenger in bringing about his said abnormal and crazy condition relieve the railroad of all liability for its said *immediate* negligence in making no investigation before accepting him as a passenger and in making no effort whatsoever thereafter to protect or care for said passenger before his injury? In other words, does the doctrine of "contributory negligence" apply in this case or is the *immediate* negligence of the railroad in failing to give any care the *proximate* cause of said passenger's injury? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his *"day in Court?"*

(b) Where the evidence CONCLUSIVELY shows that said railroad, upon discovery of said passenger hanging out the window of said train for at least one minute and a half, and having ample opportunity to give a stop signal which would have stopped the train in less than one minute, failed

to give any stop signal until *after* he fell to the ground, does this constitute "slight negligence" on the part of the railroad? If so, does the doctrine of "contributory negligence" apply here so that the *antecedent* negligence of said passenger in bringing about his said abnormal and crazy condition may relieve the railroad of all liability for its said *immediate* negligence in failing to promptly stop the train? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his "*day in Court?*"

(c) Where the evidence CONCLUSIVELY shows that the railroad failed to have any of the usual first aid equipment on hand and failed to give any first aid or proper care to said passenger after both of his feet were cut off by the train and nothing whatsoever was done to even stop the blood obviously dripping from his ankles for at least one hour after his accident, and he was covered with but one sheet and left freezing on a very cold night, does this constitute "slight negligence" on the part of the railroad? If so, does the doctrine of "contributory negligence" apply here so that the *antecedent* negligence of said passenger in bringing about his said abnormal and crazy condition may relieve the railroad of all liability for its said *immediate* negligence in failing to stop said flow of blood or give proper care? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his "*day in Court?*"

Reasons Relied On for the Allowance of the Writ

1. Circuit Court of Appeals Is In Conflict With Decision of This Court.

The blunt and frank *admissions* of the Clerk and Jury Commissioner, as set forth in detail above on pages 5 and 6

in the Statement of Matter Involved, show their *deliberate* and *purposeful* EXCLUSION of ALL building trades workers such as the iron craft, bricklayers, carpenters and machinists (R. 47) and all workingmen such as longshoremen or laborers receiving a daily wage (R. 29, 48) and their *purposeful* selection of a large majority of business men (R. 32) and those connected with *big business* concerns (R. 46) who constitute at LEAST 50% (R. 36), and their *purposeful* selection of at LEAST 50% from the *business* district of San Francisco (R. 51), their *purposeful* discrimination against women (R. 48), and their complete lack of effort, desire or attempt to obtain a *cross-section* of the community as jurors (R. 51, 48).

The above is in *direct* and *irreconcilable* conflict with the decision of this Court in *Glasser* v. *U. S.*, 315 U. S. 60, 85; 86 L. Ed. 680, 707 which emphatically holds:

> "For 'It is a part of the *established tradition* in the use of juries as instruments of public justice that the jury be a body *truly representative of the community*' • • • And its exercise (the selection of jurors) *must always* accord with the fact that the proper functioning of the jury system, and indeed, our *democracy itself, requires* that the jury be a 'body *truly representative of the community*', and *not* the organ of any special *group* or *class*. If that requirement is observed, the officials charged with choosing federal jurors may exercise *some* discretion to the end that *competent* jurors may be called. But they must *not* allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*. Tendencies, *no matter how slight*, toward the selection of jurors by any method other than a process which will *insure* a trial by a *representative* group are undermining processes weakening the institution of jury trial, and should be *sturdily resisted*. That the motives influencing such tendencies may be of the best *must not blind*

us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

Here, the jury has become the "organ" of the "*business* man" and those "connected with *big business* concerns" to the exclusion of the workingman who represents the *great* majority of our citizens.

The mere fact that the Circuit Court in its *opinion* chooses to play with words in saying that "the panel was not selected, but was drawn" (R. 134, 135), and the further fact that it *ignores* the purposeful exclusion of the working class and the purposeful discrimination against women (R. 135) does not in any way alter these ADMITTED facts, relied upon by plaintiff, as they plainly appear in the RECORD here and can be examined by this Supreme Court.

(a) The irregular jury selection methods used in this case and for many years prior thereto are not only contrary to the decisions of this Supreme Court but have become a PUBLIC SCANDAL casting a *bad odor* on the whole jury procedure in the Federal Court and urgently require correction by this Supreme Court to restore *public confidence*. Besides the unimpeached testimony here of two prominent and experienced jury trial attorneys that it was common knowledge (R. 21) that it was almost impossible to win a jury case (R. 25) against the defendant Southern Pacific Co. in the Federal Court because of the predominance of business people connected with said defendant Company (R. 15-22; 23-26), the decent civic minded men and women of San Francisco were finally aroused to have some official action taken.

(1) San Francisco Board of Supervisors Voted for Jury Reforms. After careful committee investigation of Fed-

eral jury selection methods by the Central Council of Civic Clubs, a long established, non-profit and non-political organization of some 50 improvement and civic clubs and the largest in San Francisco, said organization, on February 4, 1944, UNANIMOUSLY passed a motion "respectfully requesting the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors."

When said presiding Judge politely replied that the above request would be "filed for future reference," the said organization adopted a resolution on March 3, 1944, complaining of the discrimination against workingmen and women and urging the Board of Supervisors of the City and County of San Francisco to similarly request the adoption of "rules to govern the selection of trial jurors for that Court so as to obtain a fair cross-section of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position, and to be fairly distributed among different geographic sections." A copy of said resolution is attached at the end of this Petition, marked "Exhibit A" and is hereby referred to and made a part hereof.

The San Francisco City & County Federation of Women's Clubs, the largest women's group in San Francisco, endorsed the above stand of the Central Council of Civic Clubs and its president, Mrs. Martha Field, spoke before the whole Board of Supervisors urging passage of said resolution. Also present as a part of Mrs. Field's committee and prepared to speak in favor of said resolution was Mrs. Henry Dippel, Jr., who was and is president of the San Francisco Women's Chamber of Commerce.

Said Board of Supervisors previously had held committee meetings and even sent a special request to the Federal Court officials to be heard in this matter but they expressed no desire to appear or dispute the facts. Then Supervisor Robert Miller Green, also at attorney, stated before the whole Board that he had previously worked as a deputy clerk of said Federal Court and he knew of his own knowledge that the conditions complained of were true. *At no time* did any supervisor deny the truth of said complaints nor did any citizen offer any proof against same. Then the Board voted 6 to 3 to endorse the Central Council's request. This occurred on April 17, 1944. A copy of said Board's Resolution is attached at the end of this Petition, marked "Exhibit B" and is hereby referred to and made a part hereof.

On April 24, 1944, said Board's action was commended in an editorial in the "San Francisco News," one of the four main dailies, in which it was stated: "It *surely* is a matter of PUBLIC INTEREST to have *entirely impartial* methods used in operating the jury system in the Federal as well as in the State Courts. What have the Federal Court authorities to say about it?" They have maintained a consistent *silence*. A copy of said editorial is attached at the end of this Petition, marked "Exhibit C" and is hereby referred to and made a part hereof.

Then said Resolution was vetoed by the Mayor on the *sole* technical ground that he believed it was the policy of the Board not to take action in matters over which it had no jurisdiction, and he specifically stated: "I am in no way passing on the merits of the issue, nor do I know whether the condition complained of is as stated." A copy of said Mayor's veto is attached at the end of this Petition, marked "Exhibit D" and is hereby referred to and made a part hereof.

A move to override the Mayor's veto failed by a divided vote of 6 to 5 with the *only* argument advanced that the Board had no jurisdiction and therefore the matter should be taken up with the Attorney General.

The Attorney General replied merely that it was up to the Federal District Court Judges to adopt jury selection rules, citing *St. Clair* v. *U. S.*, 154 U. S. 134, 148.

(2) The tremendous influence of the TWO BILLION dollar Southern Pacific Co. which had many "friends" in other places besides the Federal jury became apparent as its vicious control over and corruption of the Federal jury system by "subtle" methods was being exposed for the first time. It is plainly apparent from the RECORD here that the S. P. Co.'s influence dominated the Federal jury selection system *"in substance and effect"* as condemned by this Supreme Court in *Norris* v. *Alabama*, 294 U. S. 587, *589*, and a review and similar condemnation by this Court is urgent and necessary in the *public interest* to remove this encroachment on the American right of trial by an *impartial* jury.

This "control" by defendant S. P. Co. of branches of our government in California and elsewhere is neither new nor startling. It is an old sore which apparently had been cured in 1912, but by public apathy and "subtle" methods has gradually became a cancerous growth on the Federal jury system at San Francisco and probably elsewhere. The same old S. P. Co.'s evil influence on our judicial machinery is a matter of *history* as is clearly exemplified by reference to the following books and periodicals obtainable at the San Francisco *Public* Library:

> *"Big Business and the Bench.* The Part the Railways Play in Corrupting Our Courts." Everybody's Magazine, Vol. 26, pages 296-300, March 1912, discusses the corruption by the Southern Pacific Company of San

Francisco's courts and the State Supreme Court and tells how the people elected Hiram Johnson governor on his platform to put the Southern Pacific out of politics. (He became U. S. Senator and recently passed away.)

"*Scientific Corruption of Politics.*" Hampton Magazine, Vol. 24, pages 843-858, June 1910, says: "We shall say far too little if we merely say that this machine (Southern Pacific) dominated the government of California. It was the government and all the branches thereof, not merely directing but performing."

"*People or the Railroads.*" Hearst's Magazine, Vol. 25, pages 79-92, July 1910.

"*Short History of California.*" By Hunt-Sanchez, pages 585 and 586.

"*History of the Southern Pacific.*" By Daggett, pages 199-221.

This Supreme Court is the *last* bulwark to preserve our democratic jury system and it should strike here with the full force of its power against the evil control exercised by defendant Southern Pacific Co.

2. Circuit Court's Decision Here Conflicts With Another Circuit Court.

The Ninth Circuit Court's decision here is in *direct* and *irreconcilable* conflict with the Fifth Circuit Court's recent decision in *Calloway* v. *Hart*, 146 F. (2) 103 (1944, Certiorari denied 89 L. Ed. 895) where an unguarded intoxicated passenger walked out the door of a moving train, and the Court said on page 107: "A carrier is not required to accept an *intoxicated* passenger, but when a carrier, having knowledge of a person's intoxication, *accepts* him as a passenger, then the carrier is BOUND to exercise greater care with respect to him than if he were sober. * * * Omission of duty is negligence."

Under the ADMITTED facts of the *Thiel* case, the defendant Southern Pacific Co. had *specific* and *full* knowledge not only that the plaintiff Thiel was intoxicated but had reached the point where he was acting *crazy* but yet defendant *accepted* him as a pasenger and then did absolutely nothing to care for, assist or protect plaintiff. The admitted facts of the *Thiel* case are thus *much stronger* than those of the above *Calloway* case where there was no *specific* notice to the carrier and it becomes obviously inconsistent and ludicrous to permit recovery in said *Calloway* case and yet to deny recovery in the *Thiel* case.

The mere fact that the Circuit Court in its opinion in the *Thiel* case chooses to create a non-existing and imaginary "conflict" in the evidence does not in any way alter these *admitted* facts, relied upon by plaintiff, as they plainly appear in the RECORD here and can be examined by this Supreme Court.

(a) Incidentally, it may be here mentioned that on the question of *deliberate* exclusion of women from Federal juries there is an *irreconcilable* conflict between the District Courts. *U. S.* v. *Roemig*, 52 F. Supp. 857 (1943) disapproves but *U. S.* v. *Chaplin*, 54 F. Supp. 682 (1944) approves. It is submitted that this conflict should be resolved against any total or PARTIAL exclusion of women when done *purposely*.

3. Circuit Court Has Departed From Usual Course of Judicial Proceedings.

The Circuit Court's opinion here shows such a *shocking* DISREGARD of *admitted* and *undisputed* facts in the *Record* as to call for an exercise of this Court's power of supervision. The Circuit Court's conduct here in *overlooking* important points raised has actually deprived plaintiff of his "*day in Court*" and thus the supervision of this Court

is necessary if justice is to prevail and if our Constitution is to have any meaning. 36 *Corp. Juris. Secundum*, Sec. 204b(2), page 110, Note 10, citing *Le Tulle* v. *Scofield*, 308 U. S. 415, *416, 419* (1939), and *U. S.* v. *Rizzo*, 297 U. S. 530, 533 (1936).

In order to render a decision against plaintiff, the Circuit Court has gone to the unbelievable EXTREMITY of completely rejecting the *admissions* of defendant's own agents that they knew of plaintiff's crazy condition before the train started but accepted him as a passenger and then gave him no care whatsoever. Plaintiff and appellant Thiel *repeatedly* stated in his briefs and at the oral argument that he was relying SOLELY upon defendant's *admissions* to prevail here and was not in any way relying on the *very slight* conflicts in the evidence. In spite of this, the Circuit Court speaks of "conflicts" and "contrary" evidence (R. 137-8). How IS THIS POSSIBLE? Where is the "conflicting" evidence which PREVENTS plaintiff's recovery? Plaintiff could not possibly present any stronger evidence than the ADMISSIONS of defendant's own agents.

The Circuit Court goes even further and makes a *shocking misstatement* in saying "There was *no evidence* that the persons whose names were in the box • • • were *mostly* business executives or those having the employer's viewpoint'." (R. 135). The Clerk and Jury Commissioner, as set forth previously, testified bluntly and ADMITTED "*at least* 50%" (R. 32, 37, 46).

The Circuit Court also makes a *shocking misstatement* in saying: "There was *no evidence* that women were discriminated against in *placing names in the box* or in drawing names therefrom." The Jury Commissioner bluntly ADMITTED that he "PURPOSELY put on *more men* than women" and even gave his own peculiar reasons for so discriminating (R. 48).

The Circuit Court so far departs from usual judicial proceedings as to completely OMIT the Jury Commissioner's *clear admission*, while testifying, that he does "EXCLUDE PURPOSELY" "ALL the iron craft, bricklayers, carpenters and machinists" (R. 47). This is a MOST SERIOUS omission as plaintiff set forth *in his motion* to strike the panel that he was a "wage earner" and that "mostly business executives or those having the employer's viewpoint are *purposely* selected on said panel" (R. 10). This point was also emphasized in the briefs.

The Circuit Court also OMITS the Jury Commissioner's *admission* that he makes no effort to get a "CROSS-SECTION of the people of San Francisco with regard to wealth" (R. 50) altho he knew it was his "duty" to do so (R. 48). (See *Glasser* v. *U. S.*, 315 U. S. 60, *supra.*) This point was also emphasized in the briefs.

The Circuit Court completely OMITS all the facts showing that ADMITTEDLY the plaintiff's severed ankles were permitted to bleed freely for one hour after the accident and no first aid whatsoever was given and he was covered with just one sheet and left freezing on a very cold night. The *mere statement* of these *admitted* facts shows negligence sufficient to hold defendant liable for its lack of humanity *as a matter of law*.

All of the above omitted matters had been clearly set forth in the briefs and were *specifically* called to the attention of the Circuit Court in the petition for rehearing (R. 139) so there could be no oversight.

WHEREFORE, petitioner respectfully prays that the writ of certiorari be allowed and that said decision be reviewed and reversed.

Dated, San Francisco, California, August 10, 1945.

ALLEN SPIVOCK,
Counsel for Petitioner.

EXHIBIT A

RESOLUTION REQUESTING RULES FOR JURY SELECTION IN FEDERAL COURT

Whereas, a committee duly appointed by the Central Council of Civic Clubs, after investigation and examination of the present methods used to select trial jurors in the local Federal District Court, has unanimously found (1) that no rules are prescribed by the Judges to guide the Clerk and Jury Commissioner in making their selections, as is done in our local State Superior Court; (2) that one woman is purposely selected for every four men on the panel instead of an equal proportion; (3) that jurors are selected almost entirely from one class of our citizens, so that little or no representation is given to workingmen or their wives who constitute the greater part of our citizens, and

Whereas, the Central Council of Civic Clubs has recently unanimously passed a motion respectfully requesting the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors, and

Whereas, the composition of a jury is a matter of vital concern to the public welfare and it is important that our citizens should be fully satisfied that a fair and impartial jury trial shall be received by them;

Therefore, be it hereby

Resolved: That the Central Council of Civic Clubs does hereby urge the Honorable Board of Supervisors of the City and County of San Francisco to also respectfuly request said Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to obtain a fair cross-section of the community as jurors without favoring or excluding any one group because of sex, race,

occupation, wealth or social position, and to be fairly distributed among different geographic sections.

CENTRAL COUNCIL OF CIVIC CLUBS,
(Signed) CARROLL NEWBURGH,
President;
(Signed) PLESENCE M. CURRIE,
Secretary.

Adopted: March 3, 1944.

EXHIBIT B

ENDORSING REQUEST OF CENTRAL COUNCIL OF CIVIC CLUBS THAT PRESIDING JUDGE OF FEDERAL DISTRICT COURT ADOPT RULES TO PROVIDE FOR A FAIR CROSS-SECTION REPRESENTATION OF THE COMMUNITY AS JURORS

Proposal No. 3929, Resolution No. —, as follows:

Whereas, it has been represented to the Board of Supervisors by the Central Council of Civic Clubs that after investigation and examination of the present methods used to select trial jurors in the local Federal District Court that no rules are prescribed by the judges to guide the clerk and jury commissioner in making their selections of jurors as is done in our local State Superior Court; that one woman is purposely selected for every four men on the panel instead of an equal proportion and that the jurors are selected almost entirely from one class of our citizens so that little or no representation is given to working men or their wives who constitute the greater part of our citizens; and

Whereas, the Central Council of Civic Clubs by motion respectfully requested the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors; now, therefore, be it

Resolved, That the Board of Supervisors, if the condition complained of is as stated, endorse the request of the Cen-

tral Council of Civic Clubs requesting said Presiding Judge to give consideration to the adoption of such rules as will provide for a fair cross-section representation of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position and to be fairly distributed among different geographic sections.

April 17, 1944. Passed by Board. Ayes 6, No 3, Absent 2.

EXHIBIT C

(The following appeared on the editorial page of the San Francisco News on April 24, 1944:)

Federal Court Juries

Although Supervisor Brown objected that they were out of their field of interest, a majority of supervisors voted recently to request judges to change the system of selecting jury panels in the Federal District Courts.

The objection seems to be that jury commissioners, intent upon securing jurors of intelligence to serve in the Federal Courts, have fallen into the habit of picking a high percentage of businessmen on their panels. Working men are largely excluded and the number of women is considerably less than the numbers customarily called for service in State Courts.

In damage and personal injury cases this practice militates against verdicts fair to defendants in poor circumstances, it is contended.

Perhaps the supervisors were not so much out of line after all in directing attention to this situation. It surely is a matter of public interest to have entirely impartial methods used in operating the jury system in the Federal as well as the State Courts.

What have the Federal Court authorities to say about it?

EXHIBIT D

April 24, 1944.

To the Honorable The Board of Supervisors, San Francisco, California.

GENTLEMEN:

I disapprove Proposition 3929, the Resolution adopted by you on April 17, 1944—6 members voting Aye, 3 members voting No, and 2 members absent.

The Resolution recites that the Central Council of Civic Clubs has complained of the methods now used in selecting trial jurors in the local Federal District Court. It further recites that the Central Council of Civic Clubs has requested the Presiding Judge of the local Federal District Court "to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross section of all classes of our citizens as jurors".

Based on this representation and saying "if the condition complained of is as stated", you endorse the request of the Central Council of Civic Clubs, asking the Presiding Judge of the local Federal District Court "to give consideration to the adoption of such rules as will provide for a fair cross-section representation of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position and to be fairly distributed among different geographic sections".

I am in no way passing on the merits of the issue, nor do I know whether the condition complained of is as stated; but I do point out that the adoption of this Resolution is in direct conflict with your own policy and I refer to Resolution 589 (Series of 1939) adopted by the Board of Supervisors on October 9, 1939, entitled "DECLARATION OF POLICY TO TAKE NO OFFICIAL ACTION ON MATTERS OVER WHICH THE BOARD HAS NO JURISDICTION." For ready reference, I attach a copy of that

Resolution. The record shows no repeal of this Resolution adopted almost five years ago.

Sincerely,

(Signed) ROGER D. LAPHAM,
Mayor.

RDL. H. W.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,

Petitioner,

vs.

SOUTHERN PACIFIC CO., A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below

The Circuit Court's opinion is reported in — F. (2) —, and appears on pages 132-138 of the Record.

II. Jurisdiction of This Court

A full statement of the jurisdiction of this Court appears on page 15 *supra*, and for brevity is not repeated here.

III. Statement of the Case

A full statement of the case appears *supra* commencing on page 1, and for brevity is not repeated here.

IV. Specification of Errors

The Circuit Court of Appeals erred in affirming the errors of the District Court as follows:

I. Irregularities in selection of jury preventing fair trial to plaintiff.

A. The Court erred in denying plaintiff's motion to strike out the entire panel as the evidence plainly showed that the method of selection is wholly arbitrary and distinctly favors one class or group and was so intended (R. 24, 52).

B. The Court erred in denying plaintiff's motion to strike out his demand for a jury trial because plaintiff could not hope to get a fair trial by a jury drawn from said panel (R. 70-72).

C. The Court erred in denying plaintiff's motion to strike out the 12 jurors in the box at the trial because plaintiff had exhausted his three challenges and it then appeared that numerous jurors were admittedly close friends of defendant and plaintiff could not get a fair trial from such a jury (R. 124-126).

II. The evidence is wholly insufficient to sustain the verdict and judgment for defendant.

A. The Court erred in denying plaintiff's motion for a directed verdict at the trial and in denying his motion to set aside the verdict and enter judgment for plaintiff because the evidence conclusively showed much more than the "slight negligence" of defendant as required by law in the following particulars:

1. Defendant's admitted failure to give any care or protection to plaintiff as a known demented, crazy and abnormal person whom defendant accepted as a passenger.

2. Defendant's admitted failure to stop the train, altho it had ample time to do so, when plaintiff was discovered by defendant in peril hanging from the train window for at least 1½ minutes.

3. Defendant's admitted failure to give any first aid or to stop the flow of blood from plaintiff's severed ankles for at least one hour after the accident.

Furthermore, after defendant's evidence clearly showed its full knowledge of plaintiff's abnormal and crazy condition, the Court erred in permitting defendant to still claim an alleged defense of "contributory negligence" to the above because of plaintiff's antecedent negligence in bringing about his said condition before he was accepted as a passenger. The defendant's negligence in failing to protect its accepted passenger was the sole, proximate cause of the accident.

B. The Court erred in denying plaintiff's motion for new trial on all of the above grounds or any of them.

III. The Court's error in its admission of paragraph VII of an annulment suit against plaintiff with reference to his alleged suicide attempt in going thru the train window was highly prejudicial as it was incompetent and was not an essential allegation and did not become an admission by plaintiff because of his default. Denying plaintiff his right to explain the full circumstances of said default including his attempt to have his wife's attorney remove the false allegation about his attempted suicide was further error.

IV. Errors in instructions to jury.

A. All of the numerous instructions proposed by the defendant and given by the Court re alleged "contributory negligence" of plaintiff were highly prejudicial error

because they were not supported by any evidence as defendant full knew of plaintiff's abnormal and crazy condition when it accepted him as a passenger.

B. Other instructions given but excepted to by plaintiff told the jury how to decide the case and how to decide the facts and indicated that a crazy person such as plaintiff could be guilty of negligence in a legal sense.

C. The jury was charged before any of plaintiff's objections to 55 of defendant's lengthy instructions were heard by the Court and this was in violation of a reasonable construction of Rule 51 and the understanding at the pre-trial conference, and deprived plaintiff of any reasonable or practical opportunity to make known his detailed objections.

V. The Court erred in preventing plaintiff from taking depositions after the verdict to prove defendant's trickery and unfair tactics at the trial in concealing from plaintiff a "surprise witness" on a "surprise issue" of alleged suicide, altho these were to be made known at the pre-trial conference.

A. The Court had no discretion to deny taking of said depositions while a new trial motion was pending, because under the new Rules, depositions are freely allowed, without leave of Court, after an answer has been served.

B. If the Court had discretion, it was an abuse of same to deny taking of said depositions here, because the whole purpose of the new Rules is to bring out the truth rather than to conceal it.

VI. The Court erred in denying plaintiff a new trial because the unfair tactics of defendant in producing a "sur-

prise witness" and "surprise issue" of alleged suicide attempt prevented plaintiff from obtaining a fair trial.

ARGUMENT

I. Irregularities in the Selection of Jury Preventing Fair Trial to Plaintiff

A. Plaintiff's Motion to Strike Out Entire Panel.

Plaintiff's counsel had been firmly advised by numerous attorneys who had had recent *experiences* that it would be impossible to win a jury trial against the Southern Pacific Co. in the Federal Court because the jurors were all friendly to said Company, and the proof of the matter was that said Company never lost a jury case there. He decided to make a *personal* investigation and in October, 1942, he went to interview the Clerk and Jury Commissioner who each select one-half of the 300 names to serve as jurors. He was *astounded* and *shocked* to hear from their own lips that they were guided by no rules of the Court in selecting jurors and could pick whomsoever they wished but that they preferred and *purposely* selected business men and *deliberately* omitted the working class mainly because they usually did not want to serve. Plaintiff's counsel was further astounded and shocked when he examined the Clerk's records and altho he found numerous damage actions filed against the Southern Pacific Company, it had finally prevailed in every jury case actually tried during the previous *nine* years (R. 11-15).

Faced with this alarming and almost unbelievable situation, plaintiff moved to strike out the entire jury panel and to order "selection of a new panel on a basis of fair repre-

sentation to all classes of wealth, occupation, sex and race, and by district representation, after investigation of prospective jurors to determine whether they are connected with or prejudiced in favor of such gigantic corporations as said Southern Pacific Company which *continually* have litigation pending before ths Court" (R. 9). Said motion then specifically listed 7 grounds which are summarized as follows: 1. The Judges of the District Court have failed to prescribe any rules whatever of qualifications or otherwise in selection of jurors, as they are required to do by law. 28 U. S. C. A. 411 and Calif. C. C. P. 204b.

2. That mostly business executives or those having the employer's viewpoint are *purposely* selected, thus discriminating against the working classes who are in the vast majority; that plaintiff was a *wage earner* before his accident.

3. That a larger proportion of men jurors are *purposely* selected, thus discriminating against women as jurors.

4. That the selection of jurors is wholly arbitrary because no examination of prospective jurors is made to ascertain their fitness or prejudices; that this is contrary to the method used in the highest State Court. 28 U. S. C. A. 411 and Calif. C. C. P: 204c, 205.

5. That no effort is made to proportionately or fairly represent citizens of all races on said panel, thus systematically excluding Negroes and Chinese.

6. That no effort is made to apportion jurors by districts when selecting them, as required by law. 28 U. S. C. A. 413 and Calif. C. C. P. 206.

7. That by reason of the above selection methods, defendant Southern Pacific Company has been able to prevail in all its jury trials during the past 9 years and plaintiff has

ample reasons to fear that he will not get a fair trial by jury and unless this motion be granted, he will be "in substance and effect" denied his right to trial by an *impartial* jury as guaranteed him under the Federal Constitution (*Norris* v. *Alabama*, 294 U. S. 587, 589).

With said motion, plaintiff's counsel filed his Affidavit setting forth facts to substantiate the above (R. 11).

The hearing on said motion came up on November 9, 1942 before Judge John C. Bowen who was here temporarily from Seattle, Washington.

Vincent W. Hallinan, an attorney of 22 years' practice and considerable successful jury trial experience testified (R. 16-23) that a few years ago he represented the plaintiff in *Kurtz* v. *S. P. Co.*, #20,216, before a jury and found it "selected almost exclusively from business executives, wealthy persons; no such thing as a workingman has appeared on the jury, or *workingmen's wives*. I did not see any in that case" (R. 17); that others were, for the most part, connected with the Southern Pacific in one way or another; that he did not remember any wage earners on the panel he selected the jury from; that it was a "typical" Federal Court jury; that the verdict was for the defendant S. P. Co.; that it was a very clear case for the plaintiff and he was astounded by the verdict; that the plaintiff would have prevailed in the State Court; that he had just come into *Hubner* v. *S. P. Co.* for the plaintiff and since there was no ground for remand, he moved to dismiss for the purpose of filing in the State Court; that he wrote to his client saying that there was a very good chance to recover in the State Court but no hope of recovery in the Federal Court and he advised payment of the $271.50 penalty to get a dismissal and file in the State Court and *this was done*; that the difficulty of winning damage cases before a jury in the Federal Court is *known to everyone*

because the jury is so constituted as to be prejudiced against cases of this kind; that it would be a waste of time, effort and money to try such a case before a Federal jury; that out of a population of 635,000 in 1937 in San Francisco, there were 40,000 skilled building trades workers and 60,000 laborers and skilled mechanics or a total of 100,000 hired men; that "about *three quarters* of the population were either working people or members of their family" (R. 22).

On cross-examination, he said he did not ask for a new trial in the *Kurtz* case as he would have despaired of winning it in the same Court before another jury.

Clifton Hildebrand, an attorney of about 22 years' practice and considerable successful jury trial experience, testified (R. 23-27) that a few years ago he represented the plaintiff in *Merritt* v. *S. P. Co.*, #20,238; that the verdict was for the defendant altho, it being a passenger case, ordinarily there would be no question of a recovery; that the jury was a typical jury in the Federal Court; "they were all big business men, contractors, insurance company executives, practically all of them from California Street or Sansome Street which is the *financial* district, hardly any of them from the humble walks of life, no laboring people at all" (R. 23-24). That there were no women at all and no wage earners or working class people on that panel; that he tried many cases in this Federal Court and did not recall any from "the laboring class, like carpenters *or their wives*, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices" (R. 24). That he has tried about 25 personal injury cases for plaintiffs in the Federal Court; that during the past nine years, he never won a jury case altho he had much success with juries in the State Courts; that he finally had to stop trying cases in the Federal Court because he repre-

sented laboring people and they could not get a fair trial before a jury of "big business men, insurance men and big executives"; "that the same cases that could be won in the State Court would be lost in the Federal Court"; that it is impossible to win the case in the Federal Court unless "it is just an open and shut case," but where there is any "doubt" or if the jury "can find any possible reason, they will go for the defendant, in my *experience*" (R. 25); that he is the attorney for the Building Trades Council in Alameda County and for many of the Railroad Brotherhoods; that there are about 70,000 building trades mechanics in Alameda County, 30,000 in the Central Labor Council and about 25,000 operating with different railroad brotherhoods, and "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

On cross-examination, he said he made an investigation of the whole panel and found no labor people from Alameda County or San Francisco County on it or on his jury.

Walter B. Maling, the Clerk, and William Mikulich, the Jury Commissioner, testified as set for the above in the Petition commencing on page 5, bluntly *admitting* their *deliberate* and *purposeful* discrimination in favor of big business people and against workingmen and women, and *admitting* their failure to even try to get a *cross section* of the community.

Deputy Clerk Carl Calbreath testified that since 1940, "I can say that there were a large number (of working people), *sometimes* 25%, sometimes 35%. A great many of those however, were *excused*. I have a list of a *few* of them that did serve on the jury" (R. 55); that usually *about* 50% of the jurors are "so-called wealthier business men" (R. 58).

Arthur B. Dunne, defendant's attorney, testified that he *regularly* transfers *all* personal injury cases from the State to the Federal Court where he has not lost one in the past

nine years (R. 66), because he finds the Federal Court jurors are so "fair" (R. 65).

Judge Bowen bluntly stated that it was not for him as an outside Judge to change a system so long in operation and denied the motion (R. 68).

It is submitted that in view of the above *uncontradicted* evidence, it was error to deny plaintiff's motion to strike out the whole panel.

The Law Applicable

28 U. S. C. A. 411. Jurors shall have "same qualifications" as highest State Court.

Pointer v. *U. S.*, 151 U. S. 396, *407*: State law generally controls "qualifications" but "the mode of *designating* and *impanelling* jurors • • • is *within the control*" of the Federal Court.

St. Clair v. *U. S.*, 154 U. S. 134, *148*. Quotes and approves *Pointer* v. *U. S.*

California Code of Civil Procedure, Section 198 which gives a juror's *qualifications*, followed by the Federal Court, says: "A person is competent to act as a juror if he be: 1. A *citizen* of the United States. • • • 2. In possession of his natural faculties and of ORDINARY *intelligence* and not decrepit." It is evident that the Federal Clerk was not following the above when he "generally" selected "the names of people who I think, *from their occupation and residence*, would be *intelligent* people to act as jurors in this Court" (R. 28). Altho said statute merely calls for those of "*ordinary* intelligence," said Clerk was interested only in those having such an "*occupation* and *residence*" as would indicate "substantial salaries" and "responsible positions" (R. 36-37), and thus, allegedly "superior intelli-

gence." However, the controlling statute speaks only of "*ordinary* intelligence."

Mamaux v. *U. S.*, 6 Cir., 264 Fed. 816 (1920). *Purposeful* exclusion of *wage earners* from jury panel would be ground for quashing whole panel.

Walker v. *U. S.*, 93 F. (2) 383. Selection of "business men" to exclusion of wage earner is improper.

Glasser v. *U. S.*, 315 U. S. 60, 85. Jury must be "truly representative" and a "*cross-section* of the community" and "*not* the organ of any *special group or class.*" (See Petition, pages 19 and 21 *supra.*)

California Code of Civ. Proc. 204b, c, d, e, 205, 206. Court prescribes rules; "diligent" inquiry re qualficatons; judicial supervision; apportionment by districts.

28 U. S. C. A. 413. Apportionment by district *required* for "*impartial* trial." The Jury Commissioner testified "at LEAST 50%" were selected from the "business district of San Francisco" (R. 51).

Norris v. *Alabama*, 294 U. S. 587, 589 (1935). Altho selection of jurors may be fair on its face, administrative officers may effect discrimination. Court will *inquire also* whether right to a fair trial has been "denied in *substance and effect.*"

State of Minn. v. *County Board*, 213 N. W. 545 (1927); 52 A. L. R. 916, *918*. "• • • there must be no distinction or discrimination against any particular class because of race, sex or occupation." "A county board has no more right to discriminate against them (women) in preparing jury lists than it would have to discriminate against a class of persons engaged in a particular occupation as, for example, farmers, merchants or *day laborers.*" But here the Federal officials did discriminate against those receiving a daily wage and called *none* of them (R. 29-31; 47-48).

State v. *Bolin*, 10 Wyo. 439, 471. "• • • where • • • there has been intentionally omitted from it the great mass of the names of those whom they know, or believe to be qualified, such a list would not be a legal jury list. It would be the duty of the trial court to so find.

35 *Corpus Juris, Sec.*, page 1133, Sec. 135.

7th Amendment to Federal Constitution. "Right to trial by jury shall be preserved."

Clinton v. *Englebrecht*, 13 Wall. 343 (1872). Where the jury was not selected in conformity with law, a challenge to the array should have been allowed. (Judgment reversed.)

It is respectfully submitted that *U. S.* v. *Ballard*, 35 F. Supp. 105, followed by *U. S.* v. *Chaplin*, 54 F. Supp. 682 (1944), holding that in a criminal case, a panel of no women jurors was permissible, should be disapproved because it violates the 14th Amendment to the Federal Constitution and the Court there failed to distinguish that it is bound only by the "*qualifications*" provided by State law and not by the decisions of the State Court on the *mechanics* of obtaining a jury. The above State "qualifications" do *not* exclude women. However, a much better reasoned case is *U. S.* v. *Roemig*, 52 F. Supp. 857 (1943), holding *directly to the contrary*. The total or *partial* exclusion of women as jurors, especially when done "PURPOSELY", as here, *Record 112*, cannot be tolerated under our modern viewpoint and laws. It is submitted that this sharp conflict between the District Courts on such an important issue should now be settled by this Court.

B. Plaintiff's Motion to Strike Out His Demand for Jury Trial.

After denial of said motion to strike the panel, plaintiff's counsel was so sincerely and firmly convinced from he evi-

dence above that the jury selection system distinctly favored such a gigantic corporation as defendant Southern Pacific Co. that he was *compelled* to move to strike out his demand for a jury. As would be expected from the above evidence, defendant refused to give up its unfair advantage but stoutly *insisted* on a jury trial (R. 70-71). What an odd situation! The crippled plaintiff would have to appear before the jury in a wheel chair but this did not perturb defendant one whit.

C. Plaintiff's Motion to Strike Out the 12 Jurors in the Box.

After the actual examination of jurors at the start of the trial, when the last vestiges of any possible doubt about the Southern Pacific's influence over the jury were removed, plaintiff made his final, desperate effort to get a fair trial by moving to strike out the 12 jurors in the box for cause. It was plainly evident that it was impossible to get a fair jury from said panel as practically all were obviously and even *admittedly* connected by business, social or friendly ties with defendant S. P. Co.

To avoid needless repetition, reference is hereby made to the Petition, pages *6* to *9 supra*, showing in detail the almost unbelievable influence of Defendant S. P. Co. over the panel and jury of 12 which made it impossible for plaintiff to win here even tho the defendant *admitted* its negligence on all 3 main issues.

Plaintiff testified that his main trade was as a "mechanic." How could he hope to get a fair trial from a jury dominated by defendant S. P. Co.'s business and social friends?

It is respectfully submitted that the denial of plaintiff's motion to strike out said 12 jurors was error and the sub-

sequent trial by said jury was a mockery of justice and a sad reflection on the Federal jury system.

In *Pratt* v. *Pratt;* 74 Pac. 742, 744, 141 Cal. 247, 252, the State Supreme Court, in reversing the lower Court, said: "The trial of a case should not only be fair in fact, but it should *also appear fair.* And where the contrary appears, it SHOCKS THE JUDICIAL INSTINCT *to allow the judgment to stand.*"

II. The Evidence Is Wholly Insufficient to Sustain the Verdict and Judgment

A. Plaintiff's Motion for Instructed Verdict Should Have Been Granted.

Said motion was made upon all *three* main issues and charges of negligence and should have been granted on *all* of said issues.

Only "Slight Negligence" Holds Carrier Liable

The *admissions* of defendant's agents conclusively show they were *grossly* negligent in the three main particulars set forth by plaintiff. However, the law only requires a showing of "*slight* negligence" of a *carrier* to hold it liable for injuries to a *passenger.*

In *Kline v. Santa Barbara, etc. Ry. Co.,* 150 Cal. 741, 745, the Court quotes with approval: "• • • 'passenger carriers bind themselves to carry safely those whom they admit into their coaches, as far as humar care and foresight go, that is, for the *utmost care and diligence* of *very cautious* persons, and of course they are responsible for any, even the *slightest* neglect • • • '." The Court then quotes California Civil Code Section 2100 and adds on page 746: "• • • the *carrier must exercise the utmost care, diligence and foresight of a very cautious person.*" (Emphasis by Court.)

Fitzgerald v. *S. P. Co.*, 36 Cal. Ap. 660, 663 (1918) holds that a carrier of passengers is liable for "*slight* negligence."

The Nevada Courts similarly hold that a carrier must exercise the "highest degree of care" and is liable for the "*slightest* neglect" towards a passenger.

Sherman v. *S. P. Co.*, 111 Pac. 416, 426, 33 Nev. 385, and *Murphy* v. *S. P. Co.*, 101 Pac. 322, 31 Nev. 120.

The Federal Court rule appears in *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 456, where the Court said: "• • • the carrier is required, as to passengers, to observe the *utmost* caution characteristic of *very* careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been *avoided* or *guarded against* by the exercise on his part of *extraordinary vigilance*, aided by the *highest* skill." The Court further says the carrier is liable for the "*slightest* negligence."

To the same effect is *Nat. Labor, etc.*, v. *Union Pacific*, 9th Cir., 99 F. (2) 153, 175.

Thus, the ordinary rules of negligence do not apply to the passenger-carrier relationship where the carrier must use the *utmost* care and is liable for the *slightest* neglect causing injury to its *passenger*.

No Substantial Conflict or Real Defense Here

The conflict in the evidence of both parties here is extremely slight and there is no *substantial* evidence to constitute a *real* defense to plaintiff's complaint. Apparently, there are but two minor points of conflict, neither of which can defeat plaintiff's right to recover here because there are *numerous* and *ample admissions* of negligence by defendant's own agents on the IMPORTANT points, as is plainly

shown by their testimony, answers to interrogatories, depositions, etc., appearing in the RECORD here.

The first conflict is as to only that portion of plaintiff's testimony that defendant's railroad police officer agreed to ride the train with him because of his fears for his safety and that said officer actually *got on the train* and sat with him. Altho said police officer denied this, Arthur Rippetoe, an *impartial* and *unimpeached* witness obtained by plaintiff from defendant's answer to his interrogatory, testified *positively* that he saw plaintiff and Morris get off the train and come back on *with* said railroad police officer who was talking with them and they all walked *down the aisle of the train* and *all sat down together*.

The second conflict is as to that portion of the conductor's testimony that he was actually assisting Morris in holding on to plaintiff's coat while he was hanging out the window. Again, said Rippetoe testified *positively* that *only he and Morris* were holding plaintiff and it was *impossible* for the conductor or anyone else to get in between the seats to grab ahold of plaintiff, but the conductor *just stood there* and said: "Let him go."

Now, let us turn to the *undisputed* evidence which consists almost entirely of the *admissions* of the defendant corporation itself which can only speak and act *thru its agents*. It is upon this *undisputed* evidence plainly showing much more than defendant's "*slight* negligence" that plaintiff is entitled to judgment *as a matter of law* because there is no real defense here whatever. It is not necessary for plaintiff to rely upon any of the above conflicting evidence to recover here as the defendant itself *conclusively admits* its negligence towards plaintiff as will be and has been shown.

And finally, defendant's alleged defense of "contributory negligence" is entirely *unavailable* here because it

voluntarily *accepted* plaintiff as a passenger with full knowledge of his abnormal and crazy condition.

Thus, there is no *substantial* evidence or *any* evidence to support the verdict and judgment for defendant.

1. Admitted Failure to Care for Accepted Passenger Known to Be Demented.

To avoid repetition, reference is hereby made to the Petition, pages *10* to *12* above, showing that defendant's own agents freely ADMITTED they had full knowledge of plaintiff's *abnormal* and *crazy* condition for about ten hours *before* he was sold a ticket and thus *accepted* as a passenger. Yet *admittedly*, defendant's said agents gave plaintiff no care whatsoever. A reading of the RECORD merely serves to emphasize defendant's knowledge and its callous neglect.

The Law Applicable.

The rules of defendant S. P. Co. specifically state that its agents may refuse to accept an intoxicated or abnormal person as a passenger. This rule is backed by the courts. *Calloway* v. *Hart*, 146 F. (2) 103 (1944); *Benson* v. *Tacoma Ry.*, 98 Pac. 605, 51 Wash. 216. Defendant's ticket sellers Forsyth and Wogan *knew* that plaintiff was acting crazy and afraid to leave the station and looked drunk, nervous and restless and was bothered by too many people but they made no investigation whatever of plaintiff himself and he was *accepted* as a passenger and sold coach instead of drawing room tickets in violation of the Company's *specific* rules.

After a carrier has notice, by personal observation or information, or where it should know by the exercise of reasonable care, of a person's abnormal or intoxicated condition, and it *accepts* him as a passenger, it is well established that the carrier has the *duty* to give him such *special*

care and protection as his *condition* may require, and a "*higher* degree of care" is required.

Calloway v. *Hart*, 5 Cir., 146 F. (2) 103 (Nov. 1944);
Dokus v. *Palmer*, 33 A. (2) 315, 317 (Conn. 1943);
Bourgeois v. *Toye Bros. Yellow Cab Co.*, 192 So. 379 (La. 1940);
Jameitis v. *Wilkes-Barre Ry. Co.*, 121 A. 317, 277 Pa. 437;
Fox v. *Michigan Central R. Co.*, 101 N. W. 624, 626, 138 Mich. 433;
Olson v. *Minneapolis, etc., Ry. Co.*, 175 N. W. 371, 372;
Castel v. *American Air Ways*, 88 S. W. (2) 976, 979. (Ky.)

The defendant's duty to exercise the "utmost care and diligence" requires it to make *reasonable inquiry* to safeguard its passengers from injury to themselves or others. In *Westwater* v. *S. P. Co.*, 38 Cal. Ap. (2) 369; 101 Pac. (2) 154 (1940, Hearing denied by Supreme Court), the railroad was held liable because it did not investigate even a well-mannered dog's tendencies, habits, size, etc., *before* accepting the dog which later bit a child without provocation.

After a carrier has notice, by personal observation or information, or where it should know by the exercise of reasonable care, of a passenger's demented or intoxicated condition, altho the passenger's injury results from his *own voluntary* or careless act in falling or jumping off a moving train thru a window or door, if the carrier did *not* exercise the "*utmost care*" to protect him, it IS LIABLE nonetheless.

Calloway v. *Hart*, 5 Cir., 146 F. (2) 103 (Nov. 1944);
Stewart v. *Houston Ry. Co.*, 229 S. W. 577;
Dokus v. *Palmer*, 33 A. (2) 315 (1943);
Pittman v. *Hines*, 221 S. W. 474;

Jameitis v. *Wilkes-Barre Ry. Co.*, 121 A. 317;
Benson v. *Tacoma Ry. Co.*, 98 Pac. 605;
Wheeler v. *Grand Trunk Ry. Co.*, 50 A. 103.

Alleged Contributory Negligence as a Defense

When a carrier has notice of a passenger's intoxicated or crazy condition, but accepts him as a passenger, and then fails to protect him, it cannot invoke the doctrine of contributory negligence to escape its liability. The *proximate* cause of the injury is not the passenger's *antecedent* negligence in becoming intoxicated or crazy but it is the *immediate* negligence of the carrier in failing to protect him.

13 *Corpus Juris. Sec.*, page 1552, Sec. 782;
Dokus v. *Palmer*, 33 A. (2) 315; 130 Conn. 247 (1943), where the passenger was able to walk by himself and made no disturbance while on the train;
Bourgeois v. *Toye Bros. Yellow Cab Co.*, 192 So. 379, 381 (La. 1940);
Wheeler v. *Grand Trunk Ry. Co.*, 50 A. 103; 70 N. H. 605; 54 L. R. A. 955, citing 10 *American Juris.*, page 284;
Paris & G. N. R. Co. v. *Robinson*, 140 S. W. 434, 436; citing *Hutchinson on Carriers* (3d Ed.), Sec. 1230;
Also see *Brashears* v. *Union Dredging*, 9th Cir., 104 F. (2) 762 (1939) which is not even a passenger case where the "slight negligence" rule applies.

Dictates of Humanity to Be Considered Here

In *Olson* v. *Minneapolis, etc. Ry. Co.*, 175 N. W. 371, 372, the Court said: "* * * a carrier whose agents receive and transport a drunken passenger are *bound* to exercise towards him a higher degree of care than is exercised towards the other passengers, and to employ such measures for his protection as HUMANITY dictates."

See also *Louisville, etc. Ry. Co.* v. *Gregory's Adm'r*, 133 S. W. 805, *811*, and *Paris, etc., Ry. Co.* v. *Robinson*, 140 S. W. 434, *437*.

2. Admitted Failure to Stop Train When Plaintiff Discovered in Peril.

Defendant's conductor ADMITTED that plaintiff "was hanging out the window" for all of "minute and a half," and that *he* gave the stop signal "Immediately *after* plaintiff had fallen to the ground below," and that, upon signal, the train *could* and *did* stop in "less than a minute," and it backed up 600 feet which is the USUAL stopping distance. It is simple arithmetic and INESCAPABLE logic that the signal was negligently delayed until *after* plaintiff fell to the ground as *positively* ADMITTED by defendant in answering plaintiff's interrogatories, OR if the signal was *also* given immediately by the brakeman as he *belatedly* informed defendant and finally testified to at the trial, then the engineer negligently *delayed* stopping the train for a full minute and a half while plaintiff was hanging out the window. In EITHER EVENT, defendant is liable AS A MATTER OF LAW. There is no "conflict" or at least there is none legally sufficient here to defeat plaintiff's charge of "slight" negligence by defendant in not stopping the train altho it had adequate time before he fell to the ground and was *thus* run over by the wheels of the train.

The Law Applicable

In *Hellman* v. *Los Angeles Ry.*, 27 Pac. (2) 946, 951 (Pet. for hearing denied by Supreme Court), 135 Cal. Ap. 627, 642, a woman was injured in boarding a street car and the court said: "Under plaintiff's theory she was then a *passenger* and entitled to be protected *as such* by the exercise of the *highest degree* of care."

13 *Corpus Juris. Sec.*, page 1552, Sec. 782, cited *supra*, says: "Where a carrier has the last clear chance to prevent the injury to a negligent passenger, it will be liable in damages for its failure to do so." Thus, even if we assume that Thiel was negligent in getting out the window, defendant S. P. Co. would still be liable for its negligent delay in giving the stop signal or stopping the train.

3. Admitted Failure to Give Any First Aid.

Defendant's own agents ADMITTED that the train cut off both of plaintiff's feet so that he was obviously bleeding from his ankles, and defendant was "supposed to have" first aid equipment but just happened to have none on hand; that plaintiff was put in the baggage car and "from his open wounds, his ankles, there was a pint *or more* of blood that dripped out" with nothing being done to stop plaintiff from obviously bleeding to death (R. 593-4) for ONE HOUR after the accident; that plaintiff was covered with just ONE *sheet* so that when he was brought to Truckee "He was shaking from the pain or cold. It was a *cold* night; it was VERY COLD. I (a friend of defendant's agents) took my sweater off and put it around his shoulders."

The *mere statement* of the above FACTS shows much more than "slight negligence" and holds defendants liable AS A MATTER OF LAW.

The Law Applicable

In *Alabama Great S. R. Co.* v. *Taylor*, 199 So. 310, 312 (Miss. 1940), the Court said: "The rule is well settled, and has been steadfastly maintained in this State, that when a passenger becomes sick or injured while en route, *no matter how free the carrier may be of blame* in respect to the sickness or *injury*, the carrier *owes the duty* to render to the passenger such reasonable care and attention as *common*

humanity would dictate. (Citing cases and 13 *C. J. S.*, Carriers, Sec. 754, page 1414.)

In *Dyche* v. *Vicksburg S. & P. R. Co.*, 30 So. 711, 79 Miss. 361, the *delay* of a carrier in giving aid lessened the injured *trespasser's* chance to live. It was held that the carrier had the duty of "*common humanity*" to give the injured man reasonable care and the directed verdict for the carrier was reversed. Similarly, in the *Thiel* case, the failure and delay to give any first aid and in permitting the bleeding for at least one hour favored the infection of gangrene which caused severe leg amputations which could have been prevented or lessened if proper first aid had been given. Covering the freezing plaintiff with just *one sheet* was also inhuman.

In *Casteel* v. *American Airways*, 88 S. W. 976, 980, 261 Ky. 818, it was held that the duty of care does not end on removal from the carrier but continues to provide *temporarily* for the safety of the passenger.

Summary on Motion for Judgment

In view of all of the above *admissions* of defendant's agents which defendant dare not and cannot dispute, it is submitted that said evidence CONCLUSIVELY shows much more than "slight negligence" on the part of defendant (1) in accepting plaintiff as a passenger and failing to give him even the slightest protection or consideration when his abnormal and crazy condition was so well known to defendant, (2) in failing to give any stop signal while plaintiff was perilously hanging out the window for at least one and a half minutes, and (3) in failing to give any first aid to plaintiff or any human consideration to stop the blood dripping from his severed ankles for at least an hour after the accident or even to cover him with a blanket.

Under procedure Rule 50(b), where a motion for directed verdict is denied, it is "deemed submitted" "subject to a later determination of the legal questions." Plaintiff set forth in his motions (R. 76), in his briefs and argued at Seattle, Wash., that the alleged defense of "contributory negligence" would not apply here in view of defendant's admitted knowledge of plaintiff's abnormal and crazy condition. In denying the motions, Judge Bowen was guided by his belief that plaintiff was guilty of "contributory negligence" as indicated by his closing remarks: "I happen to be one of those who sympathize greatly with this fine appearing young man who through this rash act, no matter what the stimulus or stimuli were that caused him to do it, *maimed himself* for life."

It is respectfully submitted that the Court thus erred and it should now be directed to set aside said verdict and judgment and to enter judgment for plaintiff.

In *Reliance Life Ins.* v. *Burgess*, 7 Cir., 112 F. (2) 234, 240 (1940, Cert. denied 311 U. S. 690), the jury verdict was for the defendant. The Circuit Court found the EVIDENCE INSUFFICIENT *to suppart the verdict* AS A MATTER OF LAW and reversed the trial Court's order denying plaintiff's motion to set aside the verdict and *directed* the trial Court to grant said motion and to enter judgment for the plaintiff.

Also see *Eastern* v. *Dickenson*, 107 (2) 116, 120 (Court); *Pessagno* v. *Euclid*, 112 F. (2) 577, 579-80 (1940, Jury); and *Montgomery Ward* v. *Duncan*, 85 L. Ed. 147, *167*.

Under the very unusual situation here where the admissions of the defendant alone clearly establish its liability, it is respectfully submitted that it is not necessary to retry the facts of this case but this Supreme Court should now direct the District Court to enter judgment in favor of the plaintiff, as requested in his motion (R. 76), after deter-

mination of the amount of plaintiff's damages which could now be ascertained.

III to VI. Other Points Raised on the Appeal

For brevity only, petitioner is here omitting all argument on errors set forth above in the Specification of Errors, pages 36 to 39, and numbered III to VI inclusive, and also on the denial of his motion for new trial. Petitioner hereby prays for leave to file an additional brief thereon at the proper time.

Conclusion

In view of the great importance of the matter of obtaining a jury trial by a fair and impartial group of citizens and in view of the fact that the public's interest in orderly judicial procedure is vitally affected by the malodorous situation presented here which not only affects petitioner's case but all others involving the powerful Southern Pacific Company, it is respectfully submitted that this Supreme Court should take cognizance thereof and grant certiorari so as to correct same.

Dated, San Francisco, California, August 10, 1945.

ALLEN SPIVOCK,
Counsel for Petitioner.